Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

PAUL N. BOULINEAU AND JOHN W. BURNEY,

Petitioners,

v.

JAMES E. DONALD, COMMISSIONER OF THE GEORGIA DEPARTMENT OF CORRECTIONS, GEORGIA BUREAU OF INVESTIGATION, AND GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state statute mandating the forced extraction of DNA samples from all convicted felons while in custody for law enforcement purposes without a warrant or any individualized suspicion violate the search and seizure provision of the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the following:

Boulineau, Paul N. (Appellant)

Burney, John W. (Appellant)

Donald, James E. (Appellee)

Ferrero, Joe (Defendant in district court)

Georgia Bureau of Investigation (Appellee)

Georgia Department of Corrections (Appellee)

Padgett, Roy (Plaintiff in district court)

Pettigrew, Frederick (Plaintiff-Intervenor in district court)

Wetherington, Jim (Defendant in district court)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. THE LOWER COURTS ARE SPLIT ON THE PROPER FOURTH AMENDMENT ANALYSIS TO APPLY TO DNA COLLECTION STATUTES 6

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *CITY OF INDIANAPOLIS v. EDMOND* AND *FERGUSON v. CITY OF CHARLESTON* 7

III. THE DECISION BELOW EXPANDS *UNITED STATES v. KNIGHTS* BEYOND ITS CONSTITUTIONAL LIMITS 10

IV. THE LOWER COURT'S APPLICATION OF THE *KNIGHTS* ANALYSIS TO THE SUSPICIONLESS SEARCHES AUTHORIZED BY THE STATUTE CONTRADICTS THE INTENT OF THE FRAMERS OF THE FOURTH AMENDMENT 13

A. The Framers Intended To Protect Individuals From Suspicionless Searches Conducted Pursuant To General Warrants 13

TABLE OF CONTENTS
(Continued)

Page

B. The Statute Authorizes Suspicionless Searches Similar To Those Authorized By General Warrants 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Bell v. Wolfish, 441 U.S. 520 (1979) 9, 10
Boling v. Romer, 101 F.3d 1336 (10th Cir. 1997) 7
Chandler v. Miller, 520 U.S. 305 (1997).....6
City of Indianapolis v. Edmond,
531 U.S. 32 (2000) 2, 8, 9
Ferguson v. City of Charleston,
532 U.S. 67 (2001) 2, 8, 9, 12
Green v. Berge, 354 F.3d 675 (7th Cir. 2004).....7
Groceman v. United States Dep't of Justice,
354 F.3d 411 (5th Cir. 2004).....7
Hudson v. Palmer, 468 U.S. 517 (1984).....9, 10
Jones v. Murray, 962 F.2d 302 (4th Cir.),
cert. denied, 506 U.S. 977 (1992)..... 6-7
Padgett v. Donald, 401 F.3d 1273 7
Padgett v. Ferrero, 294 F. Supp. 2d 1338 1
Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999).....7
Turner v. Safley, 482 U.S. 78 (1987).....10
United States v. Kimler, 335 F.3d 1132 (10th Cir.),
cert. denied, 540 U.S. 1083 (2003).....7
United States v. Kincade, 379 F.3d 813 (9th Cir.
2004), *cert. denied*, ___ U.S. ___,
73 U.S.L.W. 3555 (U.S. Mar. 21, 2005)
(No. 04-7253) 7
United States v. Knights,
534 U.S. 112 (2001) 6, 7, 11, 12, 13
United States v. Sczubelek,
402 F.3d 175 (3d Cir. 2005) 6, 7
Vernonia School District 47J v. Acton,
515 U.S. 646 (1995) 14

Constitutional Provisions

U.S. Const. amend. IV 1
Delaware Declaration of Rights of 1776, § 17 14

TABLE OF AUTHORITIES
(Continued)

Page

Virginia Declaration of Rights of 1776, Art. X 13

Federal Statutes

28 U.S.C. § 1254(1) 1

State Statutes

O.C.G.A. § 24-4-60 .....8, 9
O.C.G.A. § 24-4-63 .....3, 9, 10
O.C.G.A. § 33-54-1(1) 1

Other Authorities

Mark Hansen, *DNA Dragnet*, ABA JOURNAL, May 2004, at 38 2
Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS (1999) 13
Potter Stewart, *The Road To* Mapp v. Ohio *And Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) 13, 14
2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891) 13
James D. Watson, *DNA* (2003) 1

PETITION FOR A WRIT OF CERTIORARI

Paul N. Boulineau and John W. Burney respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Padgett v. Donald*, 401 F.3d 1273 (Pet. App. 1a-15a). The opinion of the United States District Court for the Northern District of Georgia is reported at *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (Pet. App. 16a-25a).

JURISDICTION

The court of appeals entered judgment on March 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The pertinent provisions of the Official Code of Georgia are reprinted in the appendix. (Pet. App. 26a-32a).

STATEMENT OF THE CASE

Deoxyribonucleic acid ("DNA") "holds the very key to the nature of living things." James D. Watson, *DNA*, xi (2003). In a very real sense, it is what makes a person what he or she is, a unique individual. As the Georgia General Assembly has recognized, "[g]enetic information is the unique property of the individual . . . " O.C.G.A. § 33-54-1(1).

In this action, Petitioners Paul Boulineau and John Burney challenge the constitutionality of a Georgia statute authorizing the forced extraction of DNA samples for use as evidence in any subsequent criminal investigation. *See* O.C.G.A. § 24-4-60 *et seq.* (the "Statute") (Pet. App. 26a-32a).

The Statute requires all convicted felons incarcerated in state correctional facilities to provide a DNA sample to the state for analysis and inclusion in the Georgia Bureau of Investigation's ("GBI") DNA database for use by federal and state investigators for law enforcement purposes. The obtaining of a DNA sample under the Statute is a warrantless search that is conducted without probable cause or even reasonable suspicion. Moreover, those searches—and the invasions of privacy attendant to such searches—are not supported by any "special need" or other exception that could exempt them from the warrant requirement. Balancing the interests of the parties, the lower court concluded that Petitioners' expectation of privacy must yield to the state's interest in creating and maintaining a DNA database for law enforcement purposes despite the fact that searches conducted pursuant to the Statute are conducted without any individualized suspicion whatsoever. Because this ruling contradicts the Court's recent decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and runs counter to the intent of the Framers in adopting the Fourth Amendment, the ruling below warrants review.

Statement of Facts. The Facts of this case are undisputed.

All 50 states and the federal government have statutes authorizing the government to take DNA samples from persons convicted of a crime, in some states, persons who have merely been arrested. *See* Mark Hansen, *DNA Dragnet*, ABA JOURNAL, May 2004, at 42. In 2000, the Georgia General Assembly amended Georgia's DNA

collection statute to require all convicted felons to provide a DNA sample for inclusion in the state's DNA database. Specifically, the Statute requires:

> [O]n and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in [Georgia] for such offense.

O.C.G.A. § 24-4-60. (Pet. App. 26a).

The "identification characteristics" obtained through analysis of DNA samples taken pursuant to the Statute are to be stored in a database maintained by the GBI. *Id.* (Pet. App. 27a). The information stored in the database "shall be made available directly to federal, state, and local law enforcement officers upon a request made in furtherance of an official investigation of any criminal offense." O.C.G.A. § 24-4-63(a). (Pet. App. 30a). Furthermore, "[t]he name of the convicted offender whose profile is contained in the data bank may be related to any other data bases which are constructed for law enforcement purposes and may be disseminated only for law enforcement purposes." O.C.G.A. § 24-4-63(b)(2). (Pet. App. 30a).

Petitioners Boulineau and Burney were convicted of felonies prior to July 1, 2000 and were incarcerated at the Men's State Prison in Hardwick, Georgia as of that date. During the pendency of this case before the district court, the state planned to collect DNA samples from Boulineau and Burney for analysis and inclusion in the GBI database pursuant to the Statute. Prior to Burney's release date, he moved for an injunction to prevent the collection, analysis,

and inclusion of his DNA in the GBI database under the Statute. By Order of the district court, Mr. Burney was required to provide a DNA sample; however, his DNA will not be analyzed or entered into the database pending the outcome of his constitutional challenge in the present case. By agreement of the parties, prior to Mr. Boulineau's release, he also provided a DNA sample, subject to the same limitations precluding the analysis and inclusion of his DNA information in the GBI DNA database. Both men, after serving their sentences, have been released from state custody.

The District Court. On July 15, 2001, Roy Padgett, an inmate at the Men's State Prison in Hardwick, Georgia, proceeding *pro se*, commenced this action challenging the constitutionality of the Statute. Petitioners Boulineau and Burney intervened in the district court action, and counsel was appointed.[1]

On September 3, 2002, Boulineau and Burney filed an Amended Complaint seeking (1) an injunction preventing the Defendants from taking DNA samples from them without their consent, and (2) a declaration that the Statute is unconstitutional. Boulineau and Burney challenged the Statute as contrary to their Georgia and U.S. Constitutional rights to be free from unreasonable searches and seizures as well as their right to privacy.

In April 2003, the parties filed cross-motions for summary judgment. Boulineau and Burney argued that because the searches at issue are conducted without a warrant, probable cause or individualized suspicion, the constitutionality of the searches was to be evaluated under the "special needs" doctrine. Moreover, because the Defendants could not

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[1] A third individual, Pettigrew, also intervened in the action. Subsequently, Padgett and Pettigrew, who gave DNA samples which are currently in the GBI DNA database, were dismissed from this action. Neither Padgett nor Pettigrew is a party to this appeal.

demonstrate that the searches were justified by a special need beyond the ordinary need for law enforcement, the Statute was unconstitutional. Finally, Boulineau and Burney argued that even if their privacy interests were balanced against the public's generalized law enforcement interest, their privacy interests outweighed the public's interest in law enforcement. The Defendants countered that the searches authorized by the Statute were reasonable and, therefore, constitutional because the public's interest in law enforcement outweighs the Plaintiffs' privacy interest.

On December 10, 2003, the district court granted summary judgment to Defendants. The district court's opinion is reported at *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003) (Pet. App. 16a-25a). On December 23, 2003, Boulineau and Burney filed a timely Notice of Appeal.

The Eleventh Circuit. On appeal, the Eleventh Circuit affirmed. The court of appeals' opinion is reported at *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005) (Pet. App. 1a-15a). Although the court of appeals acknowledged that searches conducted under the Statute are conducted without a warrant, probable cause or individualized suspicion, it concluded that the searches were reasonable under the "totality of the circumstances." (Pet. App. 10a-11a). In reaching this conclusion, the court of appeals eschewed the "special needs" analysis in favor of a test balancing the interests of the parties. (Pet. App. 7a-8a). The court of appeals struck the balance in favor of State holding that the State's interest in creating a DNA database for law enforcement purposes outweighs the intrusion involved in taking, storing and testing DNA samples. (Pet. App. 11a).

REASONS FOR GRANTING THE WRIT

In the nearly 215 years since the ratification of the Bill of Rights, this Court has *never* held constitutional a search undertaken for law enforcement purposes without at least a modicum of individualized suspicion of wrongdoing.

Indeed, this Court has strictly limited the types of searches that may be conducted on less than individualized suspicion to a "closely guarded" category of constitutionally permissible suspicionless searches. *See Chandler v. Miller*, 520 U.S. 305, 309 (1997) (concluding that "Georgia's requirement that candidates for state office pass a drug test . . . does not fit within the closely guarded category of constitutionally permissible suspicionless searches" because the searches were not justified by a special need beyond law enforcement).

The decision below joins a cadre of lower court decisions that have invaded this closely guarded category by including within its confines searches conducted to obtain DNA samples for use in criminal investigations without the protection of a warrant, probable cause or, indeed, *any* individualized suspicion whatsoever. These decisions extend this Court's recent decision in *United States v. Knights*, 534 U.S. 112 (2001), beyond its constitutional limits and are in conflict with Supreme Court jurisprudence limiting the type of permissible suspicionless searches and the intent of the Framers in adopting the Fourth Amendment. Thus, the decision below should be reviewed.

I. THE LOWER COURTS ARE SPLIT ON THE PROPER FOURTH AMENDMENT ANALYSIS TO APPLY TO DNA COLLECTION STATUTES.

Although the Circuit Courts which have addressed the constitutionality of DNA collection statutes have found them constitutional, the courts are split on the proper Fourth Amendment analysis to apply. The Third, Fourth, Fifth, Ninth and Eleventh Circuits apply a "reasonableness" test, which balances the interests of the individual against those of the state to determine whether, under the totality of the circumstances, the search was reasonable given the circumstances surrounding the search and the nature of the search itself. *See United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005); *Jones v. Murray*, 962 F.2d 302, 307 (4th

Cir.), *cert. denied*, 506 U.S. 977 (1992); *Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc), *cert. denied*, ___ U.S. ___, 73 U.S.L.W. 3555 (U.S. Mar. 21, 2005); *Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir. 2005). The Second and Seventh Circuits, on the other hand, apply a "special needs" analysis, which requires a finding that a special need beyond the ordinary need for law enforcement justifies a warrantless search before the reasonableness inquiry may be made. *See Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004). The Tenth Circuit is internally split applying both a reasonableness test and the special needs analysis in separate cases. *See Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997) (reasonableness); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir.) (special needs), *cert. denied*, 540 U.S. 1083 (2003).

The split in the lower court decisions is in large part the result of the extension of the reasonableness analysis enunciated in this Court's recent decision in *United States v. Knights*, 534 U.S. 112 (2001). *See Sczubelek*, 402 F.3d at 184-87; *Groceman*, 354 F.3d at 413; *Kincade*, 379 F.3d at 832; *Padgett*, 401 F.3d at 1278. As discussed in more detail below, applying the decision in *Knights* to suspicionless searches extends *Knights* beyond its constitutional limits and conflicts with the Framers' intent. Without decisive action by this Court, the keys to the citadel surrounding the closely guarded category of suspicionless searches will be given away. Consequently, this case should be reviewed.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *CITY OF INDIANAPOLIS v. EDMOND* AND *FERGUSON v. CITY OF CHARLESTON*

As the decision below notes, the "question of which analysis to apply is more than academic." (Pet. App. 7a). In two recent opinions, this Court defined and narrowed the

scope of the special needs doctrine, making it clear that where, as here, searches are conducted without individualized suspicion, the finding of a special need beyond the need for law enforcement is a necessary prerequisite to the application of a test balancing the interests of the state against those of the individual.

In *City of Indianapolis v. Edmond*, this Court evaluated the constitutionality of suspicionless searches conducted at drug interdiction road blocks. 531 U.S. 32, 34-36 (2000). Rather than simply analyzing the searches under a reasonableness test, the Court first considered whether the primary purpose of the road blocks evinced a special need beyond the state's interest in crime control. *Id.* at 37. Finding no such special need, the Court held that the searches violated the Fourth Amendment without reaching the type of reasonableness test applied in the decision below. *Id.* at 47-48.

Similarly, in *Ferguson v. City of Charleston*, this Court examined the constitutionality of a program authorizing hospital administrators to perform drug screens on urine samples taken from maternity patients who met certain criteria indicating a potential for drug use. 532 U.S. 67, 70-73 (2001). If samples tested positive for drug use, the police were notified. *Id.* at 72. As in *Edmond*, the Court first engaged in a special needs determination. *Id.* at 76. Again, the Court concluded that because the primary purpose of the program was to generate evidence for law enforcement purposes, no special need existed and held the program unconstitutional without performing a reasonableness test. *Id.* at 82-84.

Together, *Edmond* and *Ferguson* teach that: (1) Apart from cases involving a warrant, probable cause or some degree of individualized suspicion, a special need beyond the need for law enforcement must be found as a prerequisite to the application of a test balancing the interests of the state against those of the individual; and (2) In determining

whether a special need exists, courts must closely review the primary purpose of the regime at issue.

Despite the fact that the Statute permits the state to conduct a search of "*any* person convicted of a felony and incarcerated in a state correctional facility," with out a finding of individualized suspicion, O.C.G.A. § 24-4-60 (emphasis added) (Pet. App. 26a), and the fact that the primary purpose of the Statute is to collect evidence for use in "an official investigation of any criminal offense," O.C.G.A. § 24-4-63(a) (Pet. App. 30a), the decision below sidestepped the special needs question and simply did "not address whether [the Statute] could satisfy a 'special needs' analysis." (Pet. App. 8a n.4). Thus, the lower court's ruling cannot be reconciled with *Edmond* and *Ferguson*, 531 U.S. at 37, 41-42 (indicating that there are "only limited circumstances in which the usual rule [requiring individualized suspicion] does not apply" and concluding that "[b]ecause the primary purpose of the . . . narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment"); *Ferguson*, 532 U.S., at 76-86 (applying special needs analysis to a regime of warrantless, suspicionless searches and indicating that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes").

The decision below attempted to distinguish this case from *Edmond* and *Ferguson* by noting that "the searches they discussed were performed on free persons, not incarcerated felons." (Pet. App. 9a). This is, however, a distinction without out a constitutional difference.

Prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Indeed, prisoners are "accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer*, 468 U.S. 517, 523

(1984). An invasion of a prisoner's rights cannot stand where it "is not reasonably related to . . . penological interests." *Turner v. Safley*, 482 U.S. 78, 97 (1987). Thus, while it is true that, as the lower court noted, prisoners are subject to certain Fourth Amendment deprivations such as suspicionless searches of their cells and visual body cavity searches, those searches are conducted not to obtain evidence for use in subsequent criminal investigations, but rather to further legitimate penological interests such as prison safety. *See Bell*, 441 U.S. at 558-59 (concluding that suspicionless visual body-cavity searches of inmates are constitutional given the "serious security dangers" presented by prison environment); *Hudson*, 468 U.S. at 525-27 (upholding the constitutionality of suspicionless searches of prisoners' cells because "it would be literally impossible to accomplish the prison objectives [of institutional security and internal order] if inmates retained a right of privacy in their cells"). In this case, however, no penological interest is served by the suspicionless searches authorized by the Statute. In fact, prison officials do not even have access to the samples once they are obtained. *See* O.C.G.A. § 24-4-63(a) (limiting access to the DNA information to federal, state, and local law enforcement officers) (Pet. App. 30a). Therefore, the lower court's attempt to distinguish this case from *Edmond* and *Ferguson* falls flat. The conflict between the decision below and this Court's decisions in those cases is intractable.

III. THE DECISION BELOW EXPANDS *UNITED STATES v. KNIGHTS* BEYOND ITS CONSTITUTIONAL LIMITS.

The lower court's ruling that the constitutionality of the Statute should be evaluated under a reasonableness test was based on its conclusion that "*Knights* . . . not *Ferguson* and *Edmond*, is the applicable Supreme Court precedent . . . ." (Pet. App. 8a). The lower court read *Knights* as permitting the application of a balancing test rather than the special needs analysis *even in the absence of individualized*

suspicion. (*Id.*). Such reading, however, extends *Knights* beyond its constitutional limits.

In *Knights*, this Court evaluated the constitutionality of a warrantless search of a probationer's home to obtain evidence to be used in a criminal investigation on a showing of reasonable suspicion alone. 534 U.S. at 114-15. At the time, Knights was sentenced to probation for a drug offense. *Id.* at 114. The probation order required that Knights submit "to search at anytime, with or without a search warrant . . . or reasonable cause . . . ." *Id.* Shortly after Knights was sentenced, a Pacific Gas & Electric electrical vault was set on fire. *Id.* Brass padlocks had been removed from the vault and gasoline was used to ignite the fire. *Id.* Knights and an accomplice were suspected of committing the crime and police began surveillance of Knights' home. *Id.* at 114-15. During the surveillance, an officer saw Knights' accomplice park a pickup truck in front of Knights' residence. *Id.* at 115. The officer observed several items in the bed of the truck including a gas can and two brass padlocks similar to those removed from the scene of the arson. *Id.* Based on his observations and the condition of Knights'—probation allowing for warrantless searches, the officer conducted a search of Knights' apartment, which revealed, among other things, various bomb-making materials. *Id.*

At trial, Knights moved to suppress the evidence obtained during the search because it was conducted without a warrant. *Id.* at 116. The district court granted the motion and the Ninth Circuit affirmed. *Id.* On appeal, this Court determined that even though the search of Knights' apartment was conducted without a warrant or probable cause, it was reasonable under the totality of the circumstances "with the probation condition being a salient circumstance." *Id.* at 118. Given Knights' diminished expectation of privacy occasioned by the probation condition, this Court concluded that, under the circumstances, an officer's "reasonable suspicion that a probationer subject to a search condition is engaged in

criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable" and a warrant is not required. *Id.* at 121.

"Utilizing the *Knights* approach," the lower court in this case concluded that the Statute was reasonable by "weighing the degree to which the search intrudes on an individual's privacy against the degree to which it promotes a legitimate governmental interest." (Pet. App. 10a-11a). The lower court was "persuaded" that "[i]f the Supreme Court approves dispensing with the special needs analysis for probationers, . . . we may take a similar approach in cases involving prisoners . . . ." (*Id.* at 10a). The decision below, however, gives short shrift to a key distinction between this case and *Knights*—the search at issue in *Knights* was based on reasonable suspicion.

To extend *Knights* to cover suspicionless searches is to extend *Knights* beyond its constitutional limits. Application of *Knights* to suspicionless searches conducted for law enforcement purposes balances away protections afforded by the Fourth Amendment by vitiating the requirement that searches be based on some degree of individualized suspicion—a requirement that is waived only in a closely guarded category of case in which "the evidence obtained in the search is not intended to be used for law enforcement purposes." *Ferguson*, 532 U.S. 88 (Kennedy, J., concurring). The lower court's extension of *Knights* undermines the limited nature of constitutionally permissible suspicionless searches by permitting blanket searches of a broad class of citizens without requiring that the state demonstrate that a special need beyond law enforcement justifies the search and should, therefore, be reviewed.

IV. THE LOWER COURT'S APPLICATION OF THE *KNIGHTS* ANALYSIS TO THE SUSPICIONLESS SEARCHES AUTHORIZED BY THE STATUTE CONTRADICTS THE INTENT OF THE FRAMERS OF THE FOURTH AMENDMENT.

In adopting the Fourth Amendment, "[t]he framers sought to ensure that the newly formed federal government could not employ the two devices used by the British Crown that they believed jeopardized the liberty of every citizen: the general warrant and the writ of assistance." Potter Stewart, *The Road To* Mapp v. Ohio *And Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) (footnote omitted). *See also* 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1902 (5th ed. 1891) (noting that the introduction of the prohibition of unreasonable searches and seizures into the amendments "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution"). By applying the *Knights* analysis to the suspicionless searches authorized by the Statute, the decision below allows the state to employ what amounts to a general warrant—a practice the Framers intended to prohibit by adoption of the Fourth Amendment.

A. The Framers Intended To Protect Individuals From Suspicionless Searches Conducted Pursuant To General Warrants.

One of the most powerful law enforcement tools available to colonial authorities was the general warrant. Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS, 153-54 (1999). General warrants empowered their holder to conduct searches with only the barest assertion of suspicion or, indeed, no suspicion whatsoever. *See* Stewart, 83 COLUM. L. REV. at 1369 (indicating that general warrants "were issued without a showing of probable cause and often without even

suspicion of criminal wrongdoing"). Moreover, because "no particular individual was charged with violating the law, no name appeared on the warrants, which were valid for the duration of the life of the monarch under whose name they were issued." *Id.* Under the general warrants, "[p]robable cause in the modern sense did not exist; not even a reasonable basis for suspicion existed." Levy, at 154.

Despite their prevalence, the colonies bristled under the unbridled authority provided by general warrants. Indeed, many early state constitutions expressly prohibited their use. *See, e.g.*, Virginia Declaration of Rights of 1776, Art. X ("That general warrants, whereby any officer or messenger may . . . search suspected places without evidence of a fact committed . . . are grievous and oppressive and ought not to be granted."); Delaware Declaration of Rights of 1776, § 17 ("[A]ll general warrants to search suspected places . . . without naming or describing the place or any Person in special, are illegal . . . ."). Thus, "[w]hat the Framers of the Fourth Amendment most strongly opposed, with limited exceptions . . . , were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).

B. The Statute Authorizes Suspicionless Searches Similar To Those Authorized By General Warrants.

The Statute has many of the characteristics of the type of general warrants that the colonists inveighed against and the Framers sought to prohibit. Searches conducted pursuant to the Statute are conducted without probable cause or individualized suspicion, are directed at a broad category of persons, and because DNA samples obtained during the initial search are searched each time law enforcement officials review the database, are perpetual. *See* Stewart, 83 COLUM. L. REV. at 1369 (outlining characteristics of general warrants). Without the showing of a special need beyond

law enforcement to justify the suspicionless searches at issue in this case, the Statute is little more than a stalking-horse for general warrants. Thus, lower court's extension of *Knights* to suspicionless searches contradicts the Framers' intent in adopting the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2, 2005

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROY PADGETT, ET AL.,

Plaintiff,

PAUL N. BOULINEAU, JOHN BURNEY,

Plaintiffs-Appellants,

v.

JAMES E. DONALD, Commissioner of Georgia Department of Corrections, GEORGIA BUREAU OF INVESTIGATION, AND GEORGIA DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

No. 03-16527

FILED: March 4, 2005

On Appeal from the United States District Court for the Northern District of Georgia

Before ANDERSON and BIRCH, Circuit Judges, and ROYAL,* District Judge.

BIRCH, Circuit Judge:

In a case of first impression for our circuit, we decide whether the United States and Georgia Constitutions permit the Georgia Department of Corrections to compel incarcerated felons to submit saliva samples for DNA profiling, pursuant to O.C.G.A. § 24-4-60. The district court granted summary judgment in favor of the Commissioner of the Georgia Department of Corrections, the Georgia Bureau of Investigation, and the Georgia Department of Corrections. Because we conclude that the statute does not violate the

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* Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

Fourth Amendment, the search and seizure provisions of the Georgia Constitution, or the felons' rights to privacy under the United States or Georgia Constitutions, we AFFIRM.

I. BACKGROUND

The material facts in this case are not in dispute. In 2000, the Georgia General Assembly amended O.C.G.A. § 24-4-60 ("the statute") to require convicted, incarcerated felons to provide a sample of their DNA to the Georgia Department of Corrections ("GDOC") for analysis and storage in a data bank maintained by the Georgia Bureau of Investigation ("GBI"). *See* O.C.G.A. § 24-4-60.[1] The DNA profiles can

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[1] The relevant portion of the statute provides:

> In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such offense. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. For the purposes of this Code section, the term "state correctional facility" means a penal institution under the jurisdiction of the Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion

be released from the data bank "to federal, state, and local law enforcement officers upon a request made in furtherance of an official investigation of any criminal offense." O.C.G.A. § 24-4-63(a). The statute applies to all persons convicted of a felony and incarcerated on or after 1 July 2000 and all felons incarcerated as of that date. O.C.G.A. § 24-4-60.

The statute allows the GDOC to obtain an incarcerated felon's DNA sample by taking blood, swabbing the inside of his mouth for saliva, or using any other noninvasive procedure. *Id.* In implementing the statute, the GDOC formulated policy dictating that members of the prison staff obtain the samples by swabbing the inside of felons' mouths for saliva. The GDOC then sends the swabs to the GBI for typing and placement in the DNA database. Inmates that refuse to submit to the procedure are subjected to disciplinary reports followed by hearings and possible disciplinary action. If any inmate still refuses to cooperate, the prison staff takes the sample by force.

Roy Padgett, a Georgia prison inmate, filed a *pro se* civil rights action challenging the constitutionality of the statute. Paul Boulineau and John Burney, prison inmates convicted of felonies prior to 1 July 2000, intervened,[2] and counsel was appointed. Padgett was later dismissed from the action and is not a party to this appeal.

In their Amended Complaint, Boulineau and Burney sought a declaratory judgment that the statute violated their constitutional rights and an injunction preventing the GDOC

(continued...)

center, or probation boot camp under the jurisdiction of the Department of Corrections.

O.C.G.A. § 24-4-60.

[2] Frederick Pettigrew also intervened. He was later dismissed from the action and is not a party to this appeal.

from taking their DNA without their consent. They claimed the statute (1) violated the search and seizure provisions of the United States and Georgia Constitutions; (2) violated the Fifth and Fourteenth Amendment because it is unreasonably vague; (3) deprived them of due process of law; (4) violated their rights to privacy under the United States and Georgia Constitutions; and (5) constituted an ex post facto law in violation of the United States and Georgia Constitutions. They named the GBI, the GDOC, and the Commissioner of the GDOC ("the Commissioner") as defendants.

On cross-motions for Summary Judgment, the district court granted the GBI, the GDOC, and the Commissioner's motion for Summary Judgment and denied Boulineau and Burney's motion. The district court held that Boulineau and Burney had abandoned their claims against the GBI and the GDOC. As for their search and seizure and right to privacy claims against the Commissioner, the claims they appeal here, the district court concluded that the statute did not authorize an unreasonable search or infringe their rights to privacy in violation of the United States or Georgia Constitutions. In evaluating Boulineau and Burney's search and seizure claims, the court applied a balancing test and held that Georgia's legitimate interest in creating a DNA data bank outweighed their diminished privacy interests. It rejected Boulineau and Burney's argument that Georgia could not take their DNA samples without a suspicion of individual wrongdoing absent a "special need" other than general law enforcement. As for their right to privacy claims, the district court held that the bodily intrusion caused by the statute is minimal in light of the other invasions prisoners endure by virtue of their incarceration. It further concluded that the state's interest in creating a DNA data bank outweighed any privacy rights that Boulineau and Burney have in their identities. On appeal, Boulineau and Burney argue that the district court erred in concluding that the warrantless extraction and analysis of their DNA under the statute (1) is a constitutional search under the United

States and Georgia Constitutions; and (2) does not violate their rights to privacy.[3]

Prior to his scheduled release date, Burney moved for an injunction to prevent the collection, analysis, and storage of his DNA sample. The district court ordered Burney to provide a DNA sample but enjoined the Commissioner, the GDOC, and the GBI from analyzing the sample or including it in the data bank until further order of the court. By consent order entered on 13 January 2004, Boulineau also provided a DNA sample to the GDOC. Neither Burney nor Boulineau's DNA sample will be analyzed or stored in the data bank until the outcome of this litigation.

II. DISCUSSION

We review *de novo* a district court's legal conclusions as to the constitutionality of a statute. *Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003), *cert. denied*, 540 U.S. 947, 124 S.Ct. 389, 157 L.Ed.2d 277.

A. *Search and Seizure*

Under the Fourth Amendment,

> "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

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[3] Boulineau and Burney do not address the district court's conclusion that they abandoned their claims against the GBI and the GDOC. Thus, they waive any arguments against these defendants, and we address only their arguments against the Commissioner. *See United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998) (appellant abandons any issue not raised on appeal).

The Commissioner does not claim any immunity under the Eleventh Amendment. Because we are not required to raise the Eleventh Amendment *sua sponte, see McClendon v. Ga. Dept. of Cmty. Health*, 261 F.3d 1252, 1257 (11th Cir. 2001); *Abramson v. Gonzalez*, 949 F.2d 1567, 1570 n.1 (11th Cir. 1992), we decline to address the Commissioner's possible immunity and decide Burney and Boulineau's state constitutional claims on their merits.

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV. The Commissioner does not dispute that the statutorily required extraction of saliva for DNA profiling constitutes a "search" within the meaning of the Amendment. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1412-13, 103 L.Ed.2d 639 (1989) (blood tests, breathalyser tests, and the taking of urine constitute searches); *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) (inquiry that goes "beyond mere physical characteristics ... constantly exposed to the public" constitutes a search). As such, we need address only the search's reasonableness, an inquiry which takes into account "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *See Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414 (citation omitted).

Although reasonableness in most criminal cases depends on the government's obtaining a warrant supported by probable cause, the Supreme Court has emphasized "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (1989); *accord Skinner*, 489 U.S. at 624, 109 S.Ct. at 1417 ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."). Suspicionless searches have been upheld, for example, to protect the country's borders, *United States v. Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977), to maintain order within prisons, *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S.Ct. 3194, 3201, 82 L.Ed.2d 393 (1984), and to achieve certain administrative purposes, *New York v. Burger*, 482 U.S. 691, 702-04, 107 S.Ct. 2636, 2643-44, 96 L.Ed.2d 601 (1987). In these "special needs" cases, the Court has performed the

traditional Fourth Amendment analysis—balancing the interests of the state against the privacy interests of the individual—only after finding that the search vindicated a "special need" of government that goes beyond general law enforcement. *See, e.g., Skinner*, 489 U.S. at 619-20, 109 S.Ct. at 1414-15 (upholding nonconsensual blood and urine tests of certain railroad employees).

Each circuit to address the question has upheld the constitutionality of DNA profiling statutes, but the circuits have disagreed on whether to do so through the special needs analysis or through the traditional balancing test. The Second, Seventh, and Tenth Circuits have engaged in balancing only after finding that the statute served a special need beyond general law enforcement. *See Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir.1999); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996). The Fourth, Fifth, and Ninth Circuits have applied the traditional balancing test without finding a special need. *See Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (per curiam); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (reaffirming balancing approach of *Rise v. Oregon*, 59 F.3d 1556, 1559 (9th Cir. 1995)).

Boulineau and Burney argue that the Supreme Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), require us to join the Second, Seventh and Tenth Circuits in applying the special needs analysis. In contrast, the Commissioner argues that we should follow the Fourth, Fifth, and Ninth Circuits and engage in traditional balancing. This question of which analysis to apply is more than academic: in *Edmond* and *Ferguson*, the Supreme Court limited the scope of the special needs exception by rejecting states' arguments that suspicionless searches with stated goals of drug rehabilitation and interdiction served special

needs beyond general law enforcement. *See Edmond*, 531 U.S. at 41- 42, 121 S.Ct. at 454 ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."); *Ferguson*, 532 U.S. at 83-84, 121 S.Ct. at 1291-92 (deeming unconstitutional searches with the broader goal of drug rehabilitation for women because their immediate objective was general law enforcement). If we apply the "special needs" analysis, Boulineau and Burney argue, we cannot uphold the statute under these cases. Because we conclude that *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), not *Ferguson and Edmond*, is the applicable Supreme Court precedent, we agree with the Commissioner.[4]

Prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison," *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979), but they do not enjoy the same Fourth Amendment rights as free persons, *see Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991) (noting that a prisoner retains only those rights consistent "with his status as a prisoner or with the legitimate penological objectives of the corrective system" (citations omitted)). Prisoners have no Fourth Amendment rights against searches of their prison cells, for example. *Hudson*, 468 U.S. at 526, 104 S.Ct. at 3200. They must submit to visual body-cavity searches executed without individualized suspicion. *Bell*, 441 U.S. at 558, 99 S.Ct. at 1884. They must undergo routine tests of their blood, hair, urine, or saliva for drugs. *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (Easterbrook J., concurring). Because of these and other limitations on prisoners' Fourth Amendment rights, courts have recognized

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[4] Because we uphold the statute under a totality of the circumstances analysis, we do not address whether it could satisfy a "special needs" analysis.

that prisoners comprise a separate category of persons for purposes of the Amendment. *See, e.g., Jones*, 962 F.2d at 307 n.2; *see also, e.g., Green*, 354 F.3d at 679 (Easterbrook, J., concurring).

Ferguson and Edmond struck down suspicionless searches because they vindicated no special need distinguishable from general law enforcement. However, the searches they discussed were performed on free persons, not incarcerated felons. *Edmond*, 531 U.S. at 40-41, 121 S.Ct. at 453-54 (police searched motorists' cars at roadside checkpoints in order to uncover "evidence of ordinary criminal wrongdoing"); *Ferguson*, 532 U.S. at 82, 121 S.Ct. at 1290-91 (hospital personnel administered drug tests to certain pregnant woman and turned over any positive results to the police). Neither case condemned suspicionless searches of prisoners executed without a special need nor required us to apply the special needs analysis in every situation.

After *Ferguson and Edmond*, the Supreme Court used the traditional balancing test to evaluate warrantless searches performed on probationers, who, like prisoners, have limited Fourth Amendment rights because of their relationship with the state. In *United States v. Knights*, the Court applied the balancing test to uphold a warrantless search of a probationer's home. The search was conducted for general law enforcement purposes only and was not based on a "special need."[5] 534 U.S. at 118-21, 122 S.Ct. at 591- 92. Key to the Court's ruling was Knights' status as a probationer. *Id.* at 119, 122 S.Ct. at 591 ("Knights' status as a probationer informs both sides of the balance.") Likening probation to incarceration, the Court noted that probationers do not "enjoy the absolute liberty to which every citizen is entitled." *Id.* (citations omitted). Probationers are more

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[5] Although *Knights* involved a search based on reasonable suspicion, the Court left open the question of whether suspicionless searches of probationers are constitutional. *Knights*, 534 U.S. at 120 n.6, 122 S.Ct. 587

likely to violate the law than ordinary citizens, the Court concluded, and the state's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen." *Id.* at 120-21, 122 S.Ct. at 592. The Court explicitly rejected the argument that only searches of probationers serving a "special need" are constitutionally permissible. *Id.* at 117-18, 122 S.Ct. at 590-91.

If the Supreme Court approves dispensing with the special needs analysis for probationers, we are persuaded that we may take a similar approach in cases involving prisoners, who enjoy less Fourth Amendment rights.[6] *See Green*, 354 F.3d at 679-80 (Easterbrook, J., concurring) (arguing that the rights of prisoners, probationers, convicted but released felons, and free persons represent a continuum of Fourth Amendment liberties and may be subjected to different Fourth Amendment analyses). As such, *Ferguson and Edmond*, while consistent with our ruling, do not apply here. Instead, we follow *Knights* and apply a traditional balancing test.

Utilizing the *Knights* approach, we next address whether the statute is reasonable under a totality of the circumstances

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[6] Boulineau and Burney suggest that our decision in *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir.), requires us to conclude that prisoners enjoy the same rights to bodily privacy as free persons unless the statutorily mandated intrusion furthers a legitimate penological interest, such as institutional security. Although we concluded in *Fortner* that prisoners retain a right to bodily privacy that may be violated if female prison guards can view male prisoners in states of nudity, we held that this right was limited and noted that prisoners' rights to privacy are evaluated on a case-by-case basis. 983 F.2d at 1030. We continue to hold that prisoners, unlike free persons, retain only those rights that are consistent with their incarceration. *See Harris*, 941 F.2d at 1513. Because we rely on *Knights* to apply the balancing test to searches of prisoners, we do not need to address whether the search required by the DNA profiling statute is justified by penal concerns.

analysis. We employ a balancing test, weighing the degree to which the search intrudes on an individual's privacy against the degree to which it promotes a legitimate governmental interest. *See Knights*, 534 U.S. at 118-19, 122 S.Ct. at 591. The Fourth Circuit applied the totality of the circumstances analysis and found a similar statute to be a reasonable intrusion into convicted felons' privacy. *See Jones*, 962 F.2d at 306-08. Because we believe that Georgia's legitimate interest in creating a permanent identification record of convicted felons for law enforcement purposes outweighs the minor intrusion involved in taking prisoners' saliva samples and storing their DNA profiles, given prisoners' reduced expectation of privacy in their identities, we adopt the reasoning in *Jones* and hold that the statute does not violate the Fourth Amendment. *See id.*

We also apply the balancing test to evaluate the reasonableness of the statutorily required search under the search and seizure provision of the Georgia Constitution. *See* Ga. Const. art. I, § 1, 13; *City of East Point v. Smith*, 258 Ga. 111, 112, 365 S.E.2d 432, 434 (1988) (evaluating reasonableness of a search under the Georgia Constitution by looking to the Fourth Amendment cases as persuasive authority and applying the balancing test); *Wells v. State*, 180 Ga.App. 133, 134, 348 S.E.2d 681, 683 (1986) (noting that Georgia adopted the "totality of the circumstances" test in evaluating reasonableness of searches under its Constitution and that the standards under the federal and state Constitutions are the same). For the same reasons we adopt in our Fourth Amendment analysis, we hold that the statute does not violate Boulineau and Burney's rights to be free from unreasonable searches and seizures under the Georgia Constitution.

B. *Right to Privacy*

Boulineau and Burney contend that the district court erred in concluding that the forcible extraction of their DNA does not violate their rights to bodily privacy as guaranteed by the

United States and Georgia Constitutions. Because they explicitly waive the argument that they have an independent right to privacy in their identities, we address only the bodily intrusion caused by the statute.

1. The United States Constitution

The United States Constitution does not expressly guarantee a right to privacy, but the Supreme Court has held that a right to privacy does exist within the liberty component of the Fourteenth Amendment. *See Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973). To date, the Supreme Court has recognized two types of interests protected by the right to privacy. First, the right to privacy guards an individual's interest in avoiding disclosure of certain personal matters. Second, it protects an individual's personal autonomy in making certain important decisions, such as those involving marriage, contraception, and procreation. *Whalen v. Roe*, 429 U.S. 589, 598-99, 97 S.Ct. 869, 876-77, 51 L.Ed.2d 64 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977); *Harris*, 941 F.2d at 1513 n.26.

Boulineau and Burney argue that our decision in *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993), establishes that prisoners enjoy a right to bodily privacy that is infringed by the compelled extraction of their saliva. In *Fortner*, we held that male prisoners' rights to bodily privacy may be violated by allowing female correctional officers to view them in states of nudity. *Id.* at 1029-30. We explained, "[M]ost people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'" *Id.* at 1030 (citations omitted). *Fortner's* holding thus comports with the Supreme Court's recognition that people have a protected privacy interest in avoiding disclosure of certain personal matters—there, the exposure of their naked bodies. *See id.* at 1030. We did not consider prisoners' right to privacy against other types of

governmental intrusions, and *Fortner* cannot be read to expand the right to privacy to interests other those involving certain compelled nudity.

The statute no doubt requires the disclosure of prisoners' personal DNA information, albeit to a limited audience for limited, law enforcement purposes. However, Boulineau and Burney explicitly limit their privacy challenge to the bodily intrusion caused by the statute:

> Boulineau and Burney are not trying to hide who they are, or to prevent the state from keeping a record of lawfully obtained DNA samples. Instead, they seek to prevent illegal searches of their persons and to prevent the state from using the fruits of these illegal searches in hypothetical future criminal investigations.

Br. of Appellants Paul Boulineau and John Burney at 34. The extraction of saliva itself does not implicate their interests in avoiding disclosure of information, but rather "the right of the individual to be free in his private affairs from governmental ... intrusion." *Whalen*, 429 U.S. at 599 n.24, 97 S.Ct. at 876 n.24 (citations omitted). *Fortner* does not address prisoners' bodily privacy in this context.

Prisoners do "retain certain certain fundamental rights to privacy," and *Fortner* did not foreclose the possibility that prisoners enjoy other rights to bodily privacy in our circuit. 983 F.2d at 1029-30 (citations omitted). Nonetheless, we conclude that the right Boulineau and Burney claim here is neither "fundamental" nor "implicit in the concept of ordered liberty." *See Roe*, 410 U.S. at 152, 93 S.Ct. at 726. As we discussed *supra* section II.A, prisoners routinely undergo drug testing, which requires a bodily intrusion similar to the intrusion here. This and the other restrictions on their freedom which are inherent to their status as prisoners

indicate that the right Boulineau and Burney claim here is not protected by the right to privacy.[7]

2. The Georgia Constitution

The Georgia Constitution gives its citizens a right to privacy that is broader than that recognized by the United States Constitution. Georgia considers privacy a fundamental right, and it requires that courts carefully scrutinize cases in which an individual's privacy may have been infringed. *King v. Georgia*, 272 Ga. 788, 789, 535 S.E.2d 492, 494 (2000). The right to privacy protects matters that a reasonable person would consider private. *Id.* at 790, 535 S.E.2d 492.

A person's privacy interest is not inviolable, however. The state may constitutionally intrude upon a protected privacy interest "pursuant to a statute which effectuates a compelling state interest and which is narrowly tailored to promote only that interest." Law enforcement constitutes a compelling state interest. *Id.* at 790, 535 S.E.2d at 495.

In spite of their incarceration, Boulineau and Burney retain a right to bodily privacy under the Georgia Constitution. *Zant v. Prevatte*, 248 Ga. 832, 833-34, 286 S.E.2d 715, 716-17 (1982) (prisoners retain the right to

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[7] *Citing Turner v. Safley*, 482 U.S. 78, 97, 107 S.Ct. 2254, 2265-66, 96 L.Ed.2d 64 (1987), *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), and several other cases from other circuits, Boulineau and Burney argue that the district court erred in failing to find a legitimate penological purpose behind the statute before authorizing the required intrusion into their privacy. They contend that absent individualized suspicion, "the only applicable rationale [for invading any retained privacy rights of prisoners] is ... for legitimate penological purposes." The cases do not stand for this proposition. *Turner* addresses prison regulations, not statutes, 482 U.S. at 89, 107 S.Ct. at 2261, and it leaves intact the long standing rule that prisoners do not enjoy constitutional rights "inconsistent with [their] status as ... prisoner [s]." *Id.* at 94, 107 S.Ct. at 2265; *see Hudson*, 468 U.S. at 524, 104 S.Ct. at 3199. *Fortner*, as discussed previously, is inapposite. The other cases cited by Boulineau and Burney are Fourth Amendment cases involving free persons.

bodily privacy). The extraction of saliva required by the statute implicates this right. However, the statute promotes law enforcement, a compelling state interest, *King*, 272 Ga. at 791, 535 S.E.2d at 495, and it is narrowly tailored to promote law enforcement. The statute requires DNA profiling on incarcerated felons, O.C.G.A. § 24-4-60, a limited population. Further, it forbids the release of felons' DNA profiles except for law enforcement purposes. See O.C.G.A. § 24-4-60; O.C.G.A. § 24-4-63. Thus, the forcible extraction of saliva does not violate Boulineau and Burney's rights to privacy under the Georgia Constitution.

III. CONCLUSION

We conclude the statute does not violate Boulineau and Burney's rights against unreasonable searches and seizures or their rights to bodily privacy under the United States or Georgia Constitutions. As such, we **AFFIRM** the order of the district court.

[Reported at 294 F. Supp. 2d 1338]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

ROY PADGETT, ET AL.,

Plaintiffs,

v.

JOE FERRERO, Commissioner of Georgia Department of Corrections, et al.,

Defendants.

Civil Action No. 1:01-CV-1936-TWT.

Dec. 10, 2003

ORDER

THRASH, District Judge.

This action for injunctive relief seeks to have the Georgia law requiring DNA sampling of all convicted felons declared unconstitutional. The case is currently before the Court on Defendants' Motion for Summary Judgment [Doc. 37] and Plaintiff-Intervenors' Cross-Motion for Summary Judgment [Doc. 40]. For the reasons set forth below, the Defendants' Motion for Summary Judgment is granted and Plaintiffs' motion is denied.

I. *BACKGROUND*

The Plaintiffs are convicted felons who served or are serving prison sentences which started before July 1, 2000. Plaintiffs' sentences will end after July 1, 2000. The Defendant Georgia Bureau of Investigation is a law enforcement agency within the state of Georgia. The Defendant Georgia Department of Corrections administers the prison system for the state of Georgia. The Defendant Joe Ferrero is the Commissioner of the Georgia Department of Corrections.

The material facts in this case are not in dispute. In 2000, the Georgia General Assembly amended O.C.G.A. § 24-4-60 to require "any person convicted of a felony and incarcerated in a state correctional facility" to have a sample of his deoxyribonucleic acid ("DNA") taken: (1) by swabbing the inside of his mouth; (2) from a sample of his blood; or (3) by some other non-invasive procedure. O.C.G.A. § 24-4-60. The DNA sample is to be "typed" or analyzed to determine the identifying characteristics of the person from whom it was taken. *Id.* The convict's identifying information is to be stored in a data bank maintained by the Georgia Bureau of Investigation. *Id.* The information in the data bank may then be released directly to federal, state, or local law enforcement upon a "request made in furtherance of an official investigation of any criminal offense." O.C.G.A. § 24-4-63(a).

Two of the Plaintiffs in this case, Roy Padgett and Frederick Pettigrew, have already given DNA samples which are currently in the Georgia Bureau of Investigation's database. (Staples Aff. ¶ 6.) The action has been dismissed as to them. John Burney has given a DNA sample but it is sequestered pending the outcome of this litigation. Paul N. Boulineau has yet to provide a DNA sample. As required by the statute, Defendants will take a sample and store information from Boulineau's DNA before he is released from prison. (Hitchcock Aff. ¶ 4.) Department of Corrections' policy dictates that a member of the prison medical staff will take a sample of Boulineau's DNA by using swabs to collect saliva from the inside of his mouth. (*Id.* at ¶¶ 4-5.) Those swabs will then be sent to the Georgia Bureau of Investigation for typing and placement in the DNA database. (*Id.* at 5.) Failure to comply with the requirement to give a DNA sample will subject the inmate to a disciplinary report, followed by a hearing and disciplinary action by prison staff. (*Id.* at ¶¶ 7-9.) If the inmate still refuses to cooperate, the sample will be taken by force.

II. *SUMMARY JUDGMENT STANDARD*

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is material if it "might affect the outcome of the suit under the governing law." *Id.* The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. *DISCUSSION*

Plaintiffs claim that the DNA sampling statute is invalid as an unreasonable search and seizure in violation of the Fourth Amendment, that it violates the Ex Post Facto clause of Article I of the United States Constitution, that it violates certain privacy rights implicit in the penumbra of the Bill of Rights, that it violates the right against self incrimination, and that it deprives them of Due Process.

A. *Eleventh Amendment Immunity*

Defendants contend that the Eleventh Amendment to the United States Constitution bars the action against the Georgia Bureau of Investigation and the Georgia Department of Corrections. The Eleventh Amendment bars suit against states and those entities which are arms of the state. *Fouche*

v. Jekyll Island-State Park Authority, 713 F.2d 1518, 1520 (11th Cir. 1983). An entity is an arm of the state when the relief sought against the named defendant would actually operate against the state if granted. *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573, 1577 (11th Cir. 1994). Plaintiffs' only response is that they may seek injunctive relief against the Defendant Ferrero. This constitutes abandonment of any claims against the Georgia Bureau of Investigation and the Georgia Department of Corrections. Therefore, their Motion for Summary Judgment is granted.

B. *Fourth Amendment*

Plaintiffs claim that O.C.G.A. § 24-4-60 authorizes a search which violates their Fourth Amendment right to be free from unreasonable searches and seizures. A compelled intrusion into the body for a blood or saliva sample is a Fourth Amendment search. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Therefore, the search must be reasonable to comply with the mandate of the Fourth Amendment. What is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself," and the permissibility of the search is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402. In general, courts strike the reasonableness balance in favor of the warrant requirement of the Fourth Amendment. With some narrowly defined exceptions, a search is not reasonable unless it is carried out pursuant to a judicial warrant issued on probable cause. *Id.* In general, searches performed in the absence of a warrant and pursuant to an exception must be predicated upon "probable cause to believe that the person to be searched has violated the law," or, at the very least, "some quantum of individualized suspicion." *Id.* at 624, 109 S.Ct. 1402

In the face of Fourth Amendment challenges, the overwhelming majority of courts have held that DNA collection and typing laws are constitutional. *See Roe v. Marcotte*, 193 F.3d 72 (2nd Cir. 1999); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992). These cases properly weigh the interests of the state and those of the individuals involved. The bodily intrusion of taking a blood or saliva sample is minimal. It is not significantly greater than taking fingerprints or a photograph. The state has a compelling interest in obtaining reliable and accurate identifying characteristics of individuals convicted of felonies. These valid law enforcement interests outweigh a convicted felon's privacy interests. To the extent that probable cause or individualized suspicion is required to justify a search, the Plaintiffs' felony convictions provide that justification. Therefore, O.C.G.A. § 24-4-60 does not authorize unreasonable searches in violation of the Fourth Amendment.

Plaintiffs contend that in order for the state to take samples of their DNA, it must be acting in furtherance of a "special need" beyond general law enforcement. The special needs doctrine is an exception to the general requirement of individualized suspicion for searches; if a search is in furtherance of a special need outside of general law enforcement, then individualized suspicion is not required. Plaintiffs rely on two recent Supreme Court cases and a Ninth Circuit case for this argument. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), the Court struck down as unconstitutional motor vehicle roadblocks designed to target drug trafficking. Because the roadblocks served the ends of general law enforcement instead of a special need, the Court found them to be invalid under the Fourth Amendment. Similarly, in *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), the Court held that performing drug screens on mothers who met certain demographic criteria

was impermissible, because the statute authorized suspicionless searches designed to meet the needs of general law enforcement instead of a special need of the state. In *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), a divided panel of the Ninth Circuit relied upon these two Supreme Court cases to hold that the federal DNA act was unconstitutional.

I am not persuaded by the Plaintiffs' argument. Most importantly, the Supreme Court has not used the "special needs" analysis in defining the Fourth Amendment rights of prisoners. In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Supreme Court declined to extend the special needs doctrine to prisoners. In that case, the Court approved a suspicionless search of an inmate's cell over a Fourth Amendment challenge, without any mention of a special need. The Supreme Court began its discussion by noting that "while persons imprisoned for crimes enjoy many protections of the Constitution, it is . . . clear that imprisonment carries with it the circumscription or loss of many significant rights." *Id.* at 524, 104 S.Ct. 3194. The loss of those rights is necessitated by the needs of properly running a penological system, including internal security, justice, deterrence and retribution. *Id.* Based on those considerations, the Court concluded that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell," thus eliminating any argument that prison officials must have a special need for a suspicionless search. *Id.* at 526, 104 S.Ct. 3194.

The special needs decisions of *Edmond and Ferguson* do not alter the Supreme Court's holding in *Hudson*. Courts continue to apply the *Hudson* decision to cases involving suspicionless searches of prisoners, even though there is no special need beyond general law enforcement. *See Willis v. Artuz*, 301 F.3d 65, 67-68 (2nd Cir. 2002); *United States v. Reece*, 797 F.Supp. 843, 846 (D. Colo. 1992). The Fourth

Circuit aptly summed up the reason for the distinction between prisoner and non-prisoner cases:

> Because we consider the cases which involve the Fourth Amendment rights of prison inmates to comprise a separate category of cases to which the usual per se requirement of probable cause does not apply, there is no cause to address whether the so-called "special needs" exception, relied on by the district court, applies in this case.

Jones, 962 F.2d at 307 n.2. Thus, the Fourth Amendment special needs analysis is not applicable to cases involving searches of convicted felons. Cases cited by Plaintiffs are inapplicable because they do not concern convicted felons currently serving prison sentences. *See Lowe v. State*, 203 Ga.App. 277, 416 S.E.2d 750 (1992) (Fourth Amendment rights of pre-trial detainees); *United States v. Cohen*, 796 F.2d 20 (2nd Cir. 1986) (same).

I also decline to follow the Ninth Circuit's most recent decision in this area, *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003) (overruling *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995)). In that case, the court ignored the compelling interest of the state in obtaining accurate and reliable identifying characteristics of individuals convicted of crimes. The court's distinction between fingerprinting and obtaining a DNA sample is not of constitutional significance. The court's assertion that individuals have a lesser expectation of privacy in their fingerprints because they are exposed to public view is problematical at best. Its assertion that fingerprints are taken to affirm that law enforcement has the right person in custody, while true up to a point, completely ignores the law enforcement interest in using fingerprints to solve other crimes. Judge O'Scannlain persuasively points out the error of the court in extending the "special needs" analysis of *Edmond and Ferguson* to overrule prior circuit precedent. *Id.* at 1115-17 (O'Scannlain, J., dissenting).

Because DNA sampling is reasonable in light of the strong interests of the state and the diminished privacy interests of Plaintiffs, O.C.G.A. § 24-4-60 does not violate the Fourth Amendment. This same balancing test shows that the statute does not violate the right to be free from unreasonable searches and seizures guaranteed by the Georgia Constitution as well. *See City of East Point v. Smith*, 258 Ga. 111, 112, 365 S.E.2d 432 (1988) (looking to the Fourth Amendment and using balancing test to evaluate suspicionless drug test of fire chief). Summary judgment for Defendants is proper on Plaintiffs' search and seizure claims.

C. *Privacy Rights*

Plaintiffs claim that the statute violates their right to privacy under the Federal and Georgia Constitutions. In support of their arguments, Plaintiffs cite cases where courts determined that the justifications for a search did not comply with the requirements of the Fourth Amendment, thus unjustly infringing on reasonable expectations of privacy. *See In re Shabazz*, 200 F.Supp.2d 578, 584-85 (D.S.C. 2002) (considering legitimacy of grand jury subpoena in light of Fourth Amendment). This is not such a case. The identification of convicted felons is a legitimate state interest of great importance, and though oral swabbing or taking a blood sample is slightly more invasive than fingerprinting or photographing, it is justified by its increased accuracy and immutability. Upon imprisonment, convicted felons are subject to much greater losses of privacy than the minimal intrusion necessary to obtain a DNA sample. Since the current law went into effect on July 1, 2000, there have been almost two hundred DNA matches from the GBI database with DNA found at crime scenes. Plaintiffs' right to privacy in their identification, assuming one exists, is substantially outweighed by the interests of the state in having available a DNA database that can be used in solving crimes and exonerating the innocent. Defendants are entitled to summary judgment on Plaintiffs' privacy claims.

D. *Ex Post Facto Clause*

Plaintiffs contend that O.C.G.A. § 24-4-60 violates the ex post facto clauses of the United States and Georgia Constitutions because it may lead to an increase in the amount of time they spend in prison. Plaintiffs produced no evidence to support this argument. Instead, the only relevant evidence on this issue indicates that while a DNA sample may be taken by force in the case of a refusal, no prison sentences will be extended because of the failure to cooperate with the statute. (Hitchcock Aff. ¶¶ 7-11.) The purpose of Georgia's DNA collection statute is not to punish, but to obtain a reliable, immutable form of identification for placement in a DNA database, and all the relevant evidence in this case indicates that the statute will not increase the punishment of anyone to whom it is applied. Defendants are entitled to summary judgment on Plaintiffs' Ex Post Facto claims.

E. *Self Incrimination*

Plaintiffs contend that O.C.G.A. § 24-4-60 is unconstitutional because it forces them to submit self incriminatory evidence in violation of the Fifth Amendment of the United States Constitution and Article I, section 1, XVI of the Georgia Constitution. Plaintiffs' claims miss the mark, for DNA samples are not testimonial in nature. *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998); *see* also *Schmerber v. California*, 384 U.S. 757, 764-65, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that blood test evidence and chemical analysis were not testimonial or otherwise communicative). Defendants are entitled to summary judgment on Plaintiffs' claims that O.C.G.A. § 24-4-60 violates the guarantees against compelled self incrimination contained in the United States and Georgia Constitutions.

F. *Due Process*

Plaintiffs claim that O.C.G.A. § 24-4-60 does not comply with the Due Process requirements of the United States and

Georgia Constitutions. Plaintiffs contend that the statute fails to provide them with a meaningful opportunity to be heard before they are deprived of their release dates in which they have a liberty interest. There is no evidence upon which this Court can determine that failure to comply with the statute will result in the extension of Plaintiffs' prison sentences or denial of their parole. (Hitchcock Aff. ¶¶ 7-11.) Thus, there is no risk that Plaintiffs will be deprived of the liberty interest upon which they base their Due Process claims. Moreover, upon failure to voluntarily give a sample, a correctional officer "will issue a disciplinary report," after which the Plaintiffs would be provided a hearing at which they may call witnesses. (*Id.*) There is no Due Process violation, and Defendants are entitled to summary judgment on those claims.

IV. *CONCLUSION*

For the reasons set forth above, Defendants' Motion for Summary Judgment [Doc. 37] is GRANTED and Plaintiff-Intervenors' Cross-Motion for Summary Judgment [Doc. 40] is DENIED. The Clerk is directed to enter judgment in favor of the Defendants.

Georgia Code, Title 24 – Evidence

Chap. 4, Article 4 – DNA Analysis Upon Conviction Of Certain Sex Offenses

§ 24-4-60. Requirement for DNA analysis of persons convicted of certain sex offenses; storage of profile in data bank.

Any person convicted of a criminal offense defined in Code Section 16-6-1, relating to the offense of rape; Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-3, relating to the offense of statutory rape; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; Code Section 16-6-5.1, relating to the offense of sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient; Code Section 16-6-6, relating to the offense of bestiality; Code Section 16-6-7, relating to the offense of necrophilia; or Code Section 16-6-22, relating to the offense of incest, shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such offense. The provisions and requirements of this Code section shall also

apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. For the purposes of this Code section, the term 'state correctional facility' means a penal institution under the jurisdiction of the Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion center, or probation boot camp under the jurisdiction of the Department of Corrections.

§ 24-4-61. Time and procedure for withdrawal of samples.

(a) Each sample required pursuant to Code Section 24-4-60 from persons who are to be incarcerated shall be withdrawn within the first 30 days of incarceration at the receiving unit or at such other place as is designated by the Department of Corrections. Each sample required pursuant to Code Section 24-4-60 from persons who are to be released from a state correctional facility or private correctional facility shall be withdrawn within the 12 months preceding such person's release at a place designated by the Department of Corrections. The required samples from persons who are not sentenced to a term of confinement shall be withdrawn as a condition of probation. The Division of

Forensic Sciences of the Georgia Bureau of Investigation shall publish in its quality manuals the procedures for the collection and transfer of samples to such division pursuant to Code Section 35-3-154. Personnel at a Department of Corrections facility shall implement the provisions of this Code section as part of the regular processing of offenders.

(b) Samples collected by oral swab or by a noninvasive procedure may be collected by any individual who has been trained in the procedure. Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, graduate laboratory technician, or phlebotomist shall withdraw any sample of blood to be submitted for analysis. No civil liability shall attach to any person authorized to take a sample as provided in this article as a result of the act of taking a sample from any person submitting thereto, provided the sample was taken according to recognized medically accepted procedures. However, no person shall be relieved from liability for negligence in the withdrawing of any blood sample.

(c) Chemically clean sterile disposable needles shall be used for the withdrawal of all samples of blood. The containers for blood samples, oral swabs, and the samples obtained by noninvasive procedures shall be sealed and labeled with the subject's name, social security number, date of birth, race, and gender plus the name of the person collecting the sample and the date and place of collection. The containers shall be secured to prevent tampering with the contents. The steps set forth in this subsection relating to the taking, handling, identification, and disposition of samples are procedural and not substantive. Substantial compliance therewith shall be deemed to be sufficient. The samples shall be transported to the Division of Forensic Sciences of the Georgia Bureau of Investigation not more than 15 days following withdrawal and shall be analyzed and stored in the DNA data bank in accordance with Code Sections 24-4-62 and 24-4-63.

§ 24-4-62. Procedures for analysis and storage of blood sample; use of remainder of sample not subjected to analysis; confidentiality of results.

Whether or not the results of an analysis are to be included in the data bank, the bureau shall conduct the DNA analysis in accordance with procedures adopted by the bureau to determine identification characteristics specific to the individual whose sample is being analyzed. The director of the Georgia Bureau of Investigation or his or her designated representative shall complete and maintain on file a form indicating the name of the person whose sample is to be analyzed, the date and by whom the sample was received and examined, and a statement that the seal on the container containing the sample had not been broken or otherwise tampered with. The remainder of a sample submitted for analysis and inclusion in the data bank pursuant to Code Section 24-4-60 may be divided, if possible, labeled as provided for the original sample, and securely stored by the bureau in accordance with specific procedures of the bureau to ensure the integrity and confidentiality of the samples. All or part of the remainder of that sample may be used only to create a statistical data base provided no identifying information on the individual whose sample is being analyzed is included or for retesting by the bureau to validate or update the original analysis. A report of the results of a DNA analysis conducted by the bureau as authorized, including the identifying information, shall be made and maintained at the bureau. Except as specifically provided in this Code section and Code Section 24-4-63, the results of the analysis shall be securely stored and shall remain confidential.

§ 24-4-63. Dissemination of information in data bank to law enforcement officials; request for search; separate statistical data base authorized; fee for search and comparative analysis.

(a) It shall be the duty of the bureau to receive samples and to analyze, classify, and file the results of DNA identification characteristics of samples submitted pursuant to Code Section 24-4-60 and to make such information available as provided in this Code section. The results of an analysis and comparison of the identification of the characteristics from two or more biological samples shall be made available directly to federal, state, and local law enforcement officers upon a request made in furtherance of an official investigation of any criminal offense. A request may be made by personal contact, mail, or electronic means. The name of the requestor and the purpose for which the information is requested shall be maintained on file with the bureau.

(b)(1) Upon his or her request, a copy of the request for search shall be furnished to any person identified and charged with an offense as the result of a search of information in the data bank. Only when a sample or DNA profile supplied by the requestor satisfactorily matches the requestor's profile in the data bank shall the existence of data in the data bank be confirmed or identifying information from the data bank be disseminated.

(2) The name of the convicted offender whose profile is contained in the data bank may be related to any other data bases which are constructed for law enforcement purposes and may be disseminated only for law enforcement purposes.

(3) Upon a showing by the defendant in a criminal case that access to the DNA data bank is material to the investigation, preparation, or presentation of a defense at trial or in a motion for a new trial, a superior court having

proper jurisdiction over such criminal case shall direct the bureau to compare a DNA profile which has been generated by the defendant through an independent test against the data bank, provided that such DNA profile has been generated in accordance with standards for forensic DNA analysis adopted pursuant to 42 U.S.C. Section 14131, as amended.

(c) The bureau shall develop procedures governing the methods of obtaining information from the data bank in accordance with this Code section and procedures for verification of the identity and authority of the requestor. The bureau shall specify the positions in that agency which require regular access to the data bank and samples submitted as a necessary function of the job.

(d) The bureau may create a separate statistical data base comprised of DNA profiles of samples of persons whose identity is unknown. Nothing in this Code section or Code Section 24-4-64 shall prohibit the bureau from sharing or otherwise disseminating the information in the statistical data base with law enforcement or criminal justice agencies within or outside the state.

(e) The bureau may charge a reasonable fee to search and provide a comparative analysis of DNA profiles in the data bank to any authorized law enforcement agency outside of the state.

§ 24-4-64. Unlawful dissemination or use of information; obtaining sample without authority.

(a) Any person who, without authority, disseminates information contained in the data bank shall be guilty of a misdemeanor. Any person who disseminates, receives, or otherwise uses or attempts to so use information in the data bank, knowing that such dissemination, receipt, or use is for a purpose other than as authorized by law, shall be guilty of a misdemeanor of a high and aggravated nature.

(b) Except as authorized by law, any person who, for purposes of having DNA analysis performed, obtains or

attempts to obtain any sample submitted to the Division of Forensic Sciences for analysis shall be guilty of a felony.

§ 24-4-65. Expungement of profile in data bank upon reversal and dismissal of conviction.

A person whose DNA profile has been included in the data bank pursuant to this article may request that it be expunged on the grounds that the conviction on which the authority for including his or her DNA profile was based has been reversed and the case dismissed. The bureau shall purge all records and identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of a written request that such data be expunged, pursuant to this Code section, and a certified copy of the court order reversing and dismissing the conviction.

(2)

No. 04-1616

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAUL N. BOULINEAU AND JOHN W. BURNEY,

Petitioners,

v.

JAMES DONALD, COMMISSIONER OF THE GEORGIA DEPARTMENT OF CORRECTIONS, GEORGIA BUREAU OF INVESTIGATIONS, AND GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute mandating the extraction of a DNA sample from all incarcerated convicted felons in the state prison system violates the search and seizure provision of the Fourth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR NOT GRANTING THE WRIT	4
I. There Being No Conflict Between The Circuits, The Petition Should Be Denied	4
II. The Court Below Properly Differentiated This Case From This Court's Decisions In *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston* Such That The Decisions Are Not In Conflict	10
III. The Decision Below Does Not Expand *United States v. Knights* Beyond Its Constitutional Limits	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Beaulieu v. United States, 497 U.S. 1038 (1990) 4

Bell v. Wolfish, 441 U.S. 520 (1979) 10

Board of Education v. Earls, 536 U.S. 822 (2002) 6

Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996) 7

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) ... 3, 10, 11

Ferguson v. City of Charleston, 532 U.S. 67 (2001) ... 4, 10, 11

Green v. Berge, 354 F.3d 675 (7th Cir. 2004) 8

Groceman v. United States Dept. of Justice, et al., 354 F.3d 411 (5th Cir. 2004) 6, 7

Hudson v. Palmer, 468 U.S. 517 (1984) 10

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992) 7, 13, 14

Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2004) 3

Padgett v. Ferrero, 294 F. Supp.2d 1338 (N.D. Ga. 2003) 1, 2

Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) 7, 9

Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999) 8

Shelton v. Gudmanson, 934 F. Supp. 1048 (W.D. Wis. 1996) 8

Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989) 7

Velasquez v. Woods, et al., 329 F.3d 420 (5th Cir. 2003) 8

United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Kincade, 345 F.3d 1095 (9th Cir. 2005), rehearing granted by *United States v. Kincade*, 354 F.3d 1000 (9th Cir. 2004), vacated by, rehearing, en banc, granted by *United States v. Kincade*, 2004 U.S. App. LEXIS 89 (9th Cir. 2004) 9, 14

United States v. Kincade, 379 F.3d 813 (9th Cir. 2004), *cert. denied*, 125 S.Ct 1638 (2005) 9, 11, 14

United States v. Knights, 534 U.S. 112 (2001) 11, 12, 13

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 7

CONSTITUTIONAL AMENDMENTS:

Fourth Amendment .....*passim*

FEDERAL STATUTES:

42 U.S.C. §1983 1

SUPREME COURT RULES:

Supreme Court Rule 10 ..... 4, 5

GEORGIA STATUTES:

O.C.G.A. §24-4-60 ..... 1, 2

O.C.G.A. §24-4-63 2

STATEMENT OF THE CASE

Petitioners Boulineau and Burney are convicted felons who were serving prison terms in the Georgia correctional system when they intervened in a case which had been filed originally by fellow convicted felon Padgett. The three sued under 42 U.S.C. §1983 seeking court-ordered relief from a statutory requirement that they allow Department of Corrections personnel to take a sample of their DNA and submit it to the Georgia Bureau of Investigations (GBI) for placement in a DNA database before their release from incarceration. The Petitioners sought a ruling that the statute requiring the giving of such a sample violated their constitutional rights. They also sought an injunction stopping the Defendants from taking their samples or placing them in the database.[1]

In *Padgett v. Ferrero*, 294 F. Supp.2d 1338 (N.D. Ga. 2003), the trial court states that:

> the material facts in the case are not in dispute. In 2000, the Georgia general Assembly amended OCGA §24-4-60 to require "any person convicted of a felony and incarcerated in a state correctional facility" to have a sample of his deoxyribonucleic acid (DNA) taken: (1) by swabbing the inside of his mouth; (2) from a sample of his blood; or (3) by some other non-invasive procedure. [cit.] The DNA sample is to be 'typed' or analyzed to determine the identifying characteristics of the person from whom it was taken. *Id.* The convict's identifying information is to be

[1] Plaintiff Padgett became a non-party to the suit after he consented to the taking of a DNA sample shortly before his release from incarceration and moved to voluntarily dismiss his claims.

> stored in a data bank maintained by the Georgia Bureau of Investigation. *Id.* The information in the data bank may then be released directly to federal, state, or local law enforcement upon a "request made in furtherance of an official investigation of any criminal offense." OCGA §24-4-63(a).

294 F. Supp.2d at 1340.

The Court, in further describing the facts of the case, noted that:

> Department of Corrections' policy dictates that a member of the prison medical staff will take a sample of [an inmate's] DNA by using swabs to collect saliva from the inside of his mouth. Those swabs will then be sent to the Georgia Bureau of Investigation for typing and placement in the DNA database. Failure to comply with the requirement to give a DNA sample will subject the inmate to a disciplinary report, followed by a hearing and disciplinary action by prison staff. If the inmate still refuses to cooperate, the sample will be taken by force.

Id., at 1341.

The District Court granted summary judgment for the Respondents, saying that "[b]ecause DNA sampling is reasonable in light of the strong interests of the state and the diminished privacy interests of the Plaintiffs, OCGA §24-4-60 does not violate the Fourth Amendment." *Id.*, at 1344. The Eleventh Circuit Court of Appeals upheld the lower court's decision, saying:

> [b]ecause we believe that Georgia's legitimate interest in creating a permanent identification

> record of convicted felons for law enforcement purposes outweighs the minor intrusion involved in taking the prisoners' saliva samples and storing their DNA profiles, given prisoners' reduced expectation of privacy in their identities, we . . . hold that the statute does not violate the Fourth Amendment.

Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2004).

Following denial of a petition for rehearing, Petitioners filed their petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly ruled that the taking of a DNA sample from incarcerated convicted felons for placement in a DNA database to be used in the investigation of both past and future crimes does not violate the Petitioners' Constitutional right and unreasonable search or seizure in view of the state of the law. The decision is consistent with the holdings of all other circuit courts addressing the issue, as the Petitioners admit in their petition, saying "the Circuit Courts which have addressed the constitutionality of DNA collection statutes have found them constitutional, . . . " Brief of Petitioners, p. 6. Petitioners show the circuits are split only in their approach to the means by which they find these statutes constitutional: "[T]he courts are split," they write, "on the proper Fourth Amendment analysis to apply." Respondents submit this is an insufficient reason for this Honorable Court to grant certiorari.

Furthermore, Respondents contend that Petitioners' reliance on this Court's decisions in *City of Indianapolis v.*

Edmond, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) in arguing for certiorari is misplaced, in that those cases involved searches of free citizens rather than those incarcerated for violating a state's felony laws. Respondents urge the Court to look not at cases involving free persons, but rather at cases involving prison inmates when determining the rights of the individuals involved in the present action.

For these reasons, the petitions in the present case should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. There Being No Conflict Between The Circuits, The Petition Should Be Denied.

There is no conflict between decisions of the federal circuits as to the question at issue in the present case. Respondents argue the conflict is not ripe for a writ of certiorari at the present time. Supreme Court Rule 10(a) clearly opens the door for this Court to grant certiorari where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Petitioners urge this Court to grant certiorari based on differences as to what analysis is applied, not differing results of that analysis.

"Rule 10 of the Rules of the Supreme Court 'indicate the character of reasons' that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals," wrote Justice White, dissenting to a denial of a petition for a writ of certiorari in *Beaulieu v.*

United States, 497 U.S. 1038, 1039 (1990). Justice White, who wrote almost regularly in dissent to such denials, added that "[j]ust this past Monday, we granted certiorari in two cases that, absent conflict between courts of appeals, very likely would not have been granted. [cit.] This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10."

In *Beaulieu*, this Court declined to grant certiorari where the issue was whether a district judge can rely on testimony from the trial of a defendant's co-conspirators in sentencing that defendant. The Tenth Circuit had expressly rejected a position taken by the Eleventh Circuit on the topic. Voting 8-1, this Court elected not to take up the issue, with Justice White standing alone in dissent.

In stating the possible reasons for not taking certiorari, Justice White wrote that "[i]n some of these cases it is perhaps arguable that the alleged conflict was not 'real' or 'square'. In most cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is 'tolerable' or 'narrow,' or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason." *Id.*

It should be noted, Respondents urge, that this Court's rule clearly says the Court should consider whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeal on the same important matter." The type of analysis used, Respondents argue, is not as important as the result. Respondents also argue difference in the type of analysis, rather than difference in result, does not create the "real" difference to which Justice White

referred. The result of all circuit courts' analysis of the issue has been the same: Courts have repeatedly upheld DNA database statutes as constitutional.

"Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification." *Groceman v. U.S. Dept. of Justice, et al.*, 354 F.3d 411, 413-414 (5th Cir. 2004). Dealing with a challenge to the federal DNA database law requiring federal inmates to give a DNA sample for the FBI's database in *Groceman*, the Fifth Circuit said simply "[t]he DNA Act [] does not violate the Fourth Amendment, and its application does not infringe these plaintiffs' constitutional rights." *Id.*

Burney and Boulineau in this case challenge a law similar to that in *Groceman*: it requires that they, as felony inmates in the Georgia prison system, give a DNA sample to be placed in a database. They say it violates their Fourth Amendment right against unreasonable search and seizure.

"The Fourth Amendment to the United States Constitution protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' [cit.]" *Board of Education v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 2564, 153 L.Ed.2d 735 (2002). In *Earls*, this Honorable Court said "we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. [Cit.] But we have long held that 'the Fourth Amendment imposes no irreducible requirement of individualized

suspicion.'" *Id.*, citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

This Court has not granted certiorari on the constitutionality of taking DNA from incarcerated convicts for the purpose of filling a DNA database. However, several lower courts, like the Fifth Circuit in *Groceman, Supra,* have dealt with it and nearly all have ruled in the favor of the states. The leading case on point with the present case is *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), *cert. denied*, at 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992).

In *Jones*, the Fourth Circuit was presented with a challenge to Virginia's DNA sample requirement by six convicts. The challenged statute required all convicted felons to submit blood samples for DNA analysis and the creation of a databank for law enforcement purposes. Like the statute presently before this Court, it required felons serving time on the statute's start date to give a sample before their release.

Noting that this Honorable Court had previously upheld a program requiring blood testing of an entire class of rail workers in *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 625, 109 S.Ct. 1402, 102 L.Ed.2d 639 (1989), the Fourth Circuit said "[a]gainst the minor intrusion, . . . we weigh the government's interest in preserving a permanent identification record of convicted felons for resolving past and future crimes." 962 F.2d, at 307. The Court found the intrusion caused by the taking of blood to be outweighed by Virginia's interest in solving past and future crimes.

Other federal courts have also upheld similar statutes under Fourth Amendment attacks. *See Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Rise v. Oregon*, 59 F.3d

1556 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1554 (1996); *Velasquez v. Woods, et al.*, 329 F.3d 420, 421 (5th Cir. 2003) (saying "every circuit court to consider this issue has held that the collection of DNA samples from felons pursuant to statutes does not violate the Fourth Amendment." *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wis. 1996) (holding non-consensual cheek swabbing to obtain DNA from prisoners, even if by force, is not unreasonable under the Fourth Amendment).

Courts applying the special needs test have upheld DNA database laws as well. "The (federal) DNA Act, while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement because the desire to build a DNA database goes beyond the ordinary law enforcement need." *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003). Similarly, in *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999), the Second Circuit held that the Connecticut DNA database statute, which required DNA samples from incarcerated sex offenders, did not violate the Fourth Amendment's right against unreasonable searches because the government's special need, beyond normal law enforcement, in solving crimes, outweighed the inmates' interest in avoiding the intrusion of having a blood sample taken. *See also Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (applying the special needs test and saying "the intrusion [of taking a DNA sample] on [incarcerated felons'] privacy interest is far less that on unsuspecting pregnant women in a hospital).

The final hope for Petitioners and their fellow prisoners against the positions of all the other circuits as to the constitutionality of the taking of DNA samples for the purpose of keeping a database for use in solving crimes

was the Ninth Circuit. In *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), a panel of that court, in a 2-1 decision said the mandatory taking of a sample from parolees and probationers violated the Fourth Amendment right against unreasonable searches and seizures. That decision was overruled by a majority in an en banc decision which said as follows:

> [T]he DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity – otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody). For, as we recognized in *Rise* [Supra.] "once a person is convicted of one of the felonies included as predicate offenses under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." [cits.].

United States v. Kincade, 379 F.3d 813, 837 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1638 (2005).

Clearly, there is not a split in the circuits as to the question of whether the mandatory taking of a DNA sample from an incarcerated convicted felon for placement in a DNA database to be used for investigation of crimes, both past and future, and there is not a need for this Court to grant certiorari on the basis of a split in the circuits.

II. The Court Below Properly Differentiated This Case From This Court's Decisions In *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston* Such That The Decisions Are Not In Conflict.

As the Petitioners state in their brief, the Eleventh Circuit said in this case that the "question of which analysis to apply is more than academic." Petitioners' Appendix, 7a. The Petitioners further charge that the court below "sidestepped the special needs question," and while they say "[t]he decision below attempted to distinguish this case from *Edmond* and *Ferguson* by noting that "the searches they discussed were performed on free persons, not incarcerated felons," they, without citation, argue "[t]his is, however, a distinction without a constitutional difference." Brief of Petitioners, p. 9. Respondents contend this argument is without merit.

As the Court below correctly observed, this Honorable Court has on many occasions upheld searches of prisoners which, if done on free persons would be held to violate the Fourth Amendment. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (stating that prisoners have no Fourth Amendment rights against searches of their prison cells); *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (stating prisoners must submit to visual body-cavity searches executed without individualized suspicion). As the Eleventh Circuit correctly noted below, "courts have recognized that prisoners comprise a separate category of persons for purposes of the Amendment." Petitioners' Appendix, p. 9a. Furthermore, while this Honorable Court's decisions in *Ferguson* and *Edmond* clearly set rules for police in dealing with members of the public, as the Eleventh

Circuit points out, neither case condemns suspicionless searches of prisoners by prison personnel or requires a special need.

Courts below have properly weighed the privacy interests of prisoners against the states' interests in solving crimes and reducing recidivism, and all have concluded the states' interests outweigh those of prisoners. This Court's decisions in *Ferguson* and *Edmond* are important and compelling *in dealing with free persons*, but not with prisoners or even parolees and probationers, as the Ninth Circuit pointed out in *Kincade*, *Supra*, 379 F.3d at 832. Because the difference between prison inmates and free persons is not a distinction without a difference, but rather is a distinction with numerous differences, the decision below does not conflict with this Court's decisions in *Ferguson* or *Edmond*. As the decision below does not so conflict, certiorari should not be granted.

III. The Decision Below Does Not Expand *United States v. Knights* Beyond Its Constitutional Limits.

Petitioners misconstrue this Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) when they say "this Court evaluated the constitutionality of a warrantless search of a probationer's home to obtain evidence to be used in a criminal investigation on a showing of reasonable suspicion alone." Brief of Petitioners, p. 11. In fact, the Court also had before it a case wherein a trial court, in sentencing Knights, had mandated as a condition of Knights' probation, that Knights "submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by

any probation officer or law enforcement officer." 534 U.S. at 589. When Knights was later arrested on new federal charges based on a warrantless search by a police detective, the District Court granted a motion to suppress the evidence retrieved in the search because the search was for investigatory reasons rather than probationary purposes. The Ninth Circuit affirmed. This Court reversed, saying the condition of probation entitled the law enforcement officers in question to search without a warrant. "We conclude," this Court said, "that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances," [cit.] with the probation search condition being a salient circumstance." 534 U.S. at 118. Importantly, the Court then added:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." [cit.] Knights's status as a probationer subject to a search condition informs both sides of that balance. "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" [cit.] Probation is "one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." [cit.] Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" [cit.] Just as other punishments for criminal convictions curtail an offender's freedoms,

> a court granting probation may impose reasonable conditions that deprive the offender of some freedom enjoyed by law-abiding citizens.

Id. at 118-119.

Clearly, the same logic applies in the present case. The touchstone of the Fourth Amendment is reasonableness, and the court below, and the other circuit courts to have considered the question at issue, have addressed the minimal invasion involved with the taking of DNA samples on such a basis. The courts have unanimously said the taking of a DNA sample from a convicted felon for placement in a DNA database passes constitutional muster, and they have used proper logic to reach such a result. This Court's decision in *Knights* stands as only one of many handed down by this Court which has guided the lower courts in their considerations of the issue at hand.

Under the totality of the circumstances, the searches in question are not unreasonable. While it is true the search of Knights was supported by suspicion in addition to being authorized as a condition of probation, it is important to note that the court below only used *Knights* during its analysis of which test to apply, not in its analysis of whether the search in question was reasonable. "If the Supreme Court approves dispensing with the special needs analysis for probationers, we are persuaded that we may take a similar approach in cases involving prisoners, who enjoy less Fourth Amendment rights." Petitioner's Appendix at 10a. Instead of the *Knights* decision, in upholding the searches in question as reasonable, the Eleventh Circuit looked to the Fourth Circuit's decision in *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) for its reasoning. Similarly, this Court's reliance in the *Knights* decision on the suspicion of the officers in question came in

its decision regarding the reasonableness of the search, not in the type of test to apply.

To the extent this case may be differentiated from *Knights*, such differences do not bring about a sufficient conflict to demand certiorari in the present case. Respondents urge this Court to do the same thing it did previously in the Ninth Circuit's *United States v. Kincade* decision and the Fourth Circuit's *Jones v. Murray* decision: deny the petition for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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